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John D. O'Connell; Bruce C. Lubeck; Attorneys for Appellant;

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,)	
	:	
Plaintiff-Respondent,)	
	:	
vs.)	Case No. 15534
	:	
THEODORE ROBERT BUNDY,)	
	:	
Defendant-Appellant.)	

SUPPLEMENTAL BRIEF OF APPELLANT

Appeal from an order denying appellant's motion for a new trial or alternatively petition for extraordinary relief, the Honorable Jay E. Banks, presiding.

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APR 4 1977

Clerk, Supreme Court, Utah

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	:	
Defendant-Appellant.)	

STATEMENT OF THE NATURE OF THE CASE

Appellant was convicted and sentenced and filed a brief with this court in Case No. 14741. Reply briefs were also filed. Appellant filed a motion for a new trial or a Petition for Extraordinary Relief. The motion was denied and this appeal is based thereon, together with the direct appeal from the conviction set forth in the above briefs.

DISPOSITION IN THE LOWER COURT

After Appellant's conviction on March 1, 1976, a direct appeal was taken to this court. Briefs and reply briefs were filed in Case No. 14741 by both parties and the matter was set for oral argument. New evidence was discovered by Appellant. This case was remanded to the District Court on Appellant's motion. A motion for a new trial or a Petition for Extraordinary Relief was filed August 29, 1977. On October 3, 1977, an off the record

meeting was held before the Honorable Stewart M. Hanson, Jr., the judge who presided at the trial. Two days later, Judge Hanson, Jr., recused himself. (R.1172) On October 31, 1977, a hearing was held before the Honorable Jay E. Banks. The motion was considered and evidence heard and the motion of Appellant was denied on November 21, 1977. From this ruling Appellant takes this appeal to supplement the direct appeal as stated above.

RELIEF SOUGHT ON APPEAL

In addition to the relief sought in Case No. 14741, Appellant seeks the reversal of the order of the Court below denying his bid for a new trial and a remand of the case for a new trial.

STATEMENT OF FACTS

Appellant filed briefs on appeal and a reply brief from his conviction and in this Court the matter was set for oral argument in Case No. 14741. Due to the discovery of certain evidence Appellant moved to remand the cause to the Third Judicial District Court. That motion was granted. This was necessary so the Court below could consider Appellant's Motion for a New Trial or Petition for Extraordinary Relief, and so the lower Court could have the benefit of having the entire record before it in considering Appellant's new evidence and his motions based thereon. It was also necessary so this Court could hear one appeal rather than two separate appeals.

Hearings were held on Appellant's Motion and Petition and the Court denied Appellant's Motion. (R.1050)

The facts of the case have been set forth to some extent in Appellant's Brief in Case No. 14741, primarily pages 2-11. Additional facts were developed in the pleadings and at the hearings on Appellant's Motion for a New Trial. To be in proper context Appellant will set them forth in detail in this brief because the development of the facts of the case are so crucial to an understanding of Appellant's claim.

On November 8, 1974, between 7:00 and 7:30 p.m., Carol DaRonch was approached by a man while she was window-shopping in the Fashion Place Mall, Murray, Utah. The man informed her that someone had tried to break into her car, and he then requested that she accompany him to her car to see if anything was missing. The man, who was believed to have represented himself as a police officer, walked with Ms. DaRonch to her automobile located in the Mall parking lot, whereupon she determined that nothing was missing. The man then requested that she come with him to sign a complaint against the person who had allegedly broken into her car. Agreeing to do so, Ms. DaRonch then followed the man back to and through the Mall, across another parking lot, across a street and to a point on the sidewalk in front of a laundromat. Until this point, DaRonch had had a couple of face to face confrontations with the man, but spent most of the time walking behind or beside him. Although it was evening, there appeared to be ample artificial lighting along the course walked.

At the laundromat, the man left her and approached the building, indicating that it was a "substation", and then returned to her. This action aroused her suspicion, causing her to ask him for identification, which he produced in the form of a badge contained in a wallet. They then walked to the man's car which was parked at the curbside. She entered the passenger side and the man the driver's side. He made a u-turn, drove for approximately one half mile, and pulled abruptly to a stop in front of an elementary school. Not understanding this action, Ms. DaRonch indicated to him that this did not appear to be the police station. (R.386, 421, Exhibit 31-D) Without responding to her, he grabbed her arm and put a handcuff on it. They struggled briefly; she tried to open the car door; he produced what she described as a small revolver; he told her to stop struggling or he would "blow her head off"; and pulling away from him after this threat, she exited the car. Once outside the vehicle, she found that he had followed her out the passenger door. He grabbed her with one hand and in the other hand, which he had raised above his head, he had a metal object which DaRonch grabbed in the belief he was going to hit her with it. Quickly, she broke loose of his hold and, with the handcuffs still dangling from her arm, ran into the street where she encountered an automobile, flagged it down, and, in a somewhat hysterical state of mind, jumped into the vehicle. Neither the occupants of the car into which DaRonch fled nor DaRonch saw anything more of her assailant or his car. She was taken immediately to the Murray Police Department. (R.156-157)

In her testimony at trial, DaRonch did not venture an estimate as to the length of time she had been with her abductor, but the State stipulated to a re-enactment which showed the period she was with the man to have been from between ten and fifteen minutes.

Over nine months later, on August 16, 1975, Utah Highway Patrol Sergeant Robert Hayward pulled over a beige 1968 Volkswagen, owned and operated at the time by Appellant. Officer Hayward had stopped the vehicle in Granger, Utah, for failing to stop at the command of a police officer. A search of this vehicle at the scene by Hayward and several Salt Lake County Sheriff's Office deputies revealed, among other things, a crowbar and a pair of handcuffs. These items were seized and Appellant was arrested and booked in the county jail for failing to stop at the command of Hayward.

On August 21, 1975, Appellant was re-arrested at his Salt Lake City apartment pursuant to a warrant issued for the offense of possession of burglary tools. It was the items seized from his car on August 16, 1975, which constituted the alleged tools. Appellant was taken to the Salt Lake County Jail, where he was booked, and shortly thereafter, interrogated by a Detective Ben Forbes regarding several matters, including the November 8, 1974, abduction of Carol DaRonch. According to Forbes, Appellant's car resembled the one used in the DaRonch abduction. At this time, Appellant's signature was obtained on a consent form, and and later that afternoon his apartment was searched in his presence

by three Salt Lake County detectives. Following the search, Detective Jerry Thompson received Appellant's permission to take and did take several polaroid pictures of Appellant's automobile.

Eleven months after the kidnapping, on October 2, 1975, Appellant was ordered to appear in a line-up. At the line-up, Ms. DaRonch made a positive identification of Appellant. He was immediately placed under arrest, and charged with aggravated kidnapping in violation of Utah Code Ann., Section 76-5-302 (Supp. 1975). (R.863) On February 22, 1976, a bench trial was held in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Stewart M. Hanson, Jr., presiding. The prosecution was based on the eyewitness identification testimony of DaRonch. There was no physical evidence or other identification testimony to corroborate the DaRonch identification. Circumstantial evidence presented was remote, if not improbate. Appellant was convicted on March 1, 1976, and was sentenced to an indeterminant term of between one and fifteen years in the Utah State Prison on June 30, 1976.

According to police reports released to Appellant's counsel prior to his trial, the first reported action taken in regard to Appellant as a suspect in the DaRonch matter, after the August 21, 1975, search of his apartment, occurred on September 1, 1975. A police report by Detective Jerry Thompson indicated that on September 1, he met with Ms. DaRonch at her place of work and showed to her the polaroid pictures of Appellant's car, after

which he showed her a photographic array of between twenty and thirty pictures, one of which being a mug shot taken of Appellant during his booking on August 16, 1975. (R.432,435) Thompson's September 1 report will be analyzed in depth later, but in essence, it alleges that DaRonch made a tentative identification of Appellant. Further, it said that DeRonch expressed an opinion that she would be able and willing to identify her kidnapper in person at a physical lineup.

Next, according to pretrial discovery material, DaRonch was shown another photographic array containing a driver's license photo of Appellant taken in December, 1974. Again, DaRonch purportedly made a "looks like" identification according to a Bountiful City Police Department report of September 4, 1975. The reports then reveal that on September 8, 1975, DaRonch was taken to the address where Appellant resided and there viewed his car. The report in question stated that DaRonch indicated "this looks like the car...". (R.504, 875, 843)

The only other contact with the victim, admitted to by police which occurred prior to the October 2 lineup, occurred on or about September 30, 1975. At this time, DaRonch was taken to the University of Utah College of Law to view Appellant, but he was not there that day. The four contacts described above were confirmed both by discovery material and pretrial hearing and trial testimony. (R. 568, 864-865)

In preparing for pretrial hearings and trial, Appellant's counsel relied heavily on the statements and representations contained in the police reports mentioned above, which dealt with critical pre-lineup contacts made with DaRonch by police.

In January, 1977, Appellant was extradited to Pitkin County, Colorado, to face a murder charge. In April, 1977, he successfully applied to the Colorado court to permit him to proceed without counsel. During that same month, he filed extensive discovery motions, including motions directly related to the DaRonch kidnapping case because the Colorado prosecuting authorities had indicated that they would attempt to use such evidence as a "similar transaction" to the Colorado offense. In response to a court order on the discovery motions, a meeting was held in Glenwood Springs, Colorado, on May 24, 1977, between Milton K. Blakey, a special prosecutor with the Pitkin County District Attorney's Office; Michael Fisher, an investigator for the District Attorney's Office; and the defendant, pro se. The purpose of the meeting was for the prosecutor to release to Appellant all court ordered or otherwise discoverable material in his files. (R. 989-991, 1005-1007)

During the course of the discovery session, Michael Fisher gave Appellant a nine page document which Fisher said had been sent to him by Detective Jerry Thompson. The first line of the document reads: "The below report is being compiled by Detective Jerry Thompson, Salt Lake County Sheriff's Office, on 9-10-75."

The disclosure of this document has been noted in reports on that discovery session filed by Mr. Blakey and Appellant with the Clerk of the Pitkin County District Court, the same document having been heretofore filed in this case. (R.992-996)

The nine page document disclosed in Colorado is actually two reports: one four page report followed by a five page report. The second five page report begins with a description of Thompson's search of Appellant's apartment on August 21, 1975, and continues with activities occurring on August 22, 1975, which includes Thompson's showing to DaRonch pictures of Appellant and Appellant's automobile. This second Thompson report (R.984) shall be referred to throughout this brief as the "suppressed report".

A reading of this report shows that it contains a number of very exculpatory statements which go directly to the reliability of DaRonch as an eyewitness, which directly contradict a Thompson report on this same incident (September 1, 1975) released to Appellant's counsel prior to the DaRonch kidnapping trial, and which had never been made known to Appellant or his defense counsel prior to or during the kidnapping trial.

In December, 1975, the Salt Lake County prosecutor gave defense counsel a Thompson report typed on a "Follow-up Report" form. (R.983) The report was dated September 1, 1975. This report shall be referred to throughout this brief as the "released report". The relevant portion of that report reads:

"She went through the stack of pictures and pulled Mr. Bundy's picture out, handed me the stack back and stated, 'I don't see anyone in there'. I then asked her what the one was doing in her hand. She stated, 'Oh, I forgot this', and handed it back to me. She was questioned as to why she pulled it out. She stated, 'I don't know, it looks something like him. I really don't know, I can't be sure, but it does look a lot like him'. She was asked at this time if she would be willing, if we got a lineup set up, to view the individual in person. She stated that she would be more than willing to and that if she saw the individual in person she felt rather confident that she could identify him." (Emphasis added.)

Thompson's report given to defendant on May 24, 1977, referred to as the suppressed report, reads in part as follows:

"...In going through the pictures, she pulled out Mr. Bundy's picture in her hand, gave the pictures back to this officer, stating, 'I don't see anyone in there that resembles him'. She was asked what the one was doing in her hand. She stated, 'Oh, here'. I asked her if that was the guy or why she pulled it out. She stated, 'I don't know, aah, I guess it looks something like him'. She was asked if she was afraid to identify him, and she stated no. She said, 'That looked maybe something like him, she really just didn't know, she didn't think she could identify him if she saw him again or not. This is a very poor witness in this detective's opinion, and I don't know if she can identify the individual or if she is scared or what the situation is. As of this date, communication is still going on with several other agencies by this detective and Detective Forbes. They are attempting to come up with a lineup on this individual through Bountiful and possibly some other state's witnesses coming in. It has not been set up yet." (Emphasis added.)

The suppressed version of Thompson's report gives the distinct impression that DaRonch did not identify Appellant ("she really just didn't know"), and that in addition, she

expressed her doubt that she would be able to identify her abductor again if she did see him. This is a far cry from the "official" version which has DaRonch expressing confidence about identifying the man in person at a lineup. In fact, Thompson makes no request whatsoever that DaRonch attend a lineup in the suppressed report. In the released version, Appellant comes off looking "a lot like" the abductor, while in the suppressed version he "looked maybe something like him" but "she really just didn't know".

Equally as devastating is the revelation in the suppressed report that, "This is a very poor witness in this detective's opinion and I don't know if she can identify the individual or if she is scared or what the situation is". The implications of this statement are far-reaching. Thompson, a veteran investigator, calls DaRonch a "very poor witness". He then expressed doubt that she had made any kind of identification of the accused ("I don't know if she can identify the individual...").

There is an obvious problem. The suppressed report depicts a witness who is confused to the point that no one knows if she has or if she can make an identification. The released report's assertion that she "felt rather confident she could identify him" in a lineup is patently absurd and false. It is now apparent why no lineup was held until over a month after this first photo display: DaRonch was a poor witness who had failed to pick the suspect's picture.

The suppressed report closes with Thompson looking for a way to "come up with a lineup on this individual" through witnesses in other jurisdictions. His opinion that DaRonch is a "very poor witness" is emphasized even further by his rejection of using DaRonch in a lineup.

ARGUMENT

POINT I

BOTH THE SALT LAKE COUNTY SHERIFF'S OFFICE AND THE SALT LAKE COUNTY ATTORNEY HAD A DUTY TO DISCLOSE DETECTIVE THOMPSON'S SUPPRESSED REPORT.

Detective Jerry Thompson testified at the trial that the first time Carol DaRonch was approached regarding Theodore Bundy was on September 1, 1975, and that was the only time that he had shown her photographs. He testified that he gave her a packet of 27 photographs of different individuals, one of which was a photograph of Appellant, Theodore Bundy; that she looked through the packet to determine if any of the men depicted resembled the man who had abducted her; that in looking through the packet she removed the photograph of Theodore Bundy, looked through the rest of the stack and returned it to the witness with the comment: "I don't see anyone in here"; that he then asked her, "how about the photograph that was in her hand," and she replied: "Oh this one, I don't know. Here", and handed it to the witness; that the witness "then asked her why she pulled that photograph out, if there was something significant about it; and that Carol DaRonch then said: "Yes, I believe that looks a lot like the individual, but I'm not sure".

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Machine-generated OCR, may contain errors. (S. 497, 975, 1006)

Jerry Thompson further testified that he gave another photograph of Appellant to officers of the Bountiful Police to show to Carol DaRonch. Detective Ira Beal testified that on September 4, 1975, he showed to Carol DaRonch a packet of eight pictures, containing a photograph of Appellant, but no other photograph that she had seen before and, particularly, no photographs of the four other individuals she had previously picked as looking like her abductor. (R. 525-529, 975, 1066)

Carol DaRonch testified that she did not recall what she said to Detective Thompson on September 1, 1975, in regard to Appellant's photograph and had even a hazier recollection regarding the photograph shown to her by Detective Beal on September 4, 1975. (R. 974, 1006)

On December 19, 1975, the defendant filed a Motion for Order Requiring Disclosure that requested, among other things, that the court order the County Attorney's Office "to produce for inspection all written reports in the possession of the State concerning the investigation of this case" and "to disclose to the defendant any and all evidence which is or may be favorable or exculpatory to the defendant . . . including reports concerning the viewing of photographs by Carol DaRonche (sic) and . . . any occasions Carol DaRonche (sic) was shown photographs of defendant and either made no identification or failed to make a certain identification." At a hearing on this motion on December 12, 1975, before the Honorable Peter Leary, the prosecuting attorney

agreed to provide defense counsel with the reports regarding the two times Carol DaRonch had been shown the defendant's photographs according to the police officers and the court ordered him to do so. (R. 976, 1006)

On January 15, 1976, defendant's Motion for Disclosure came on for further hearing before the Honorable Peter Leary. At that time the prosecuting attorney, David Yocom, agreed to furnish the reports requested in the motion which were in his possession and the court so ordered. Defense counsel expressed his concern that the Sheriff's Office may have a report pertaining to this incident which tends to be exculpatory to this defendant and which they may withhold from the County Attorney and therefore requested the court to make the order directly applicable to law enforcement agencies. David Yocom represented to the court that he had examined the entire records of the Salt Lake County Sheriff's Office and that, "I know what is contained in that record relating to this particular offense and I can represent to the court that I have everything in that record pertaining to this particular offense." The court, expressly relying upon Mr. Yocom's representation, declined to extend the order to directly apply to the Salt Lake County Sheriff. (R. 976, 991, 1006)

On January 15, 1976, the prosecution filed a written Reply to Defendant's Motion for Disclosure, over the signature of the County Attorney by David Yocom, which stated that the

reports concerning the viewing of photographs by Carol DaRonch had been previously submitted to counsel for the defendant.

(R.977, 1006)

On February 17, 1976, the Honorable Stewart M. Hanson, Jr. issued an order directed to the Sheriff of Salt Lake County and Captain N.D. Hayward, among others, directing them to forthwith deliver to David Yocom copies of all reports, memoranda, and correspondence pertaining, in any way, to the investigation of the abduction of Carol DaRonch. (R.82)

The only report concerning the September 1, 1975 viewing of photographs by Carol DaRonch furnished to counsel for the defense was a document purporting to be a "Follow-Up Report", dated September 1, 1975, with the typed "signature" of Jerry Thompson. This report conformed substantially with the testimony of Jerry Thompson at the trial, and is referred to hereafter as the "disclosed report." (R. 983, 977, 1007) This report, in addition to the matters discussed in paragraph 3, supra, contained the statement: "She was asked at this time if she would be willing, if we got a line-up set up, to view the individual in person. She stated she would be more than willing to and that if she saw the individual in person felt rather confident that she could identify him."

At a hearing on defendant's Motion to Suppress, held on January 21, 1976, before the Honorable Stewart M. Hanson, Jr.,

Jerry Thompson testified, under oath, that the Disclosed Report reflected what Carol DaRonch did and said during the viewing of photographs on September 1, 1975, as best he could recall.

(R.977, 978, 1007)

On May 24, 1977, Michael Fisher, an investigator for the Pitkin County, Colorado, District Attorney's Office, in the presence of Milton K. Blakey, Deputy District Attorney for Pitkin County, handed to Theodore Bundy a report which Michael Fisher stated he had received from Jerry Thompson of the Salt Lake County Sheriff's Office. This report also describes, among other things, the viewing of photographs, including a photograph of Theodore Bundy, by Carol DaRonch at the request of Jerry Thompson.

The suppressed report and the disclosed report, although written by the same detective and described the same incident differ in the following significant particulars:

(a) The disclosed report states that Carol DaRonch informed Detective Thompson that "if she saw the individual in person she felt rather confident that she could identify him," while the suppressed report states, "she didn't think she could identify him if she saw him again or not."

(b) In the disclosed report and in his testimony, Detective Thompson indicated that after Miss DaRonch said that she did not see anyone in the packet of pictures, that he asked her, in neutral language, why she had pulled Mr. Bundy's picture

out and she replied, "I don't know, I can't be sure, but it looks something like him. I really don't know, I can't be sure, but it does look a lot like him." Whereas, the suppressed report states that Detective Thompson asked the suggestive question "if that was the guy or why she pulled it out" and she replied, "I don't know, aah, I guess it looks something like him." The suppressed report then indicates that Detective Thompson asked the additional highly suggestive and challenging question, if she was afraid to identify Mr. Bundy, which she denied and then conceded "that looked maybe something like him."

(c) The disclosed report does not reflect Detective Thompson's opinion that Carol DaRonch was "a very poor witness" as does the suppressed report.

(d) The whole tone of the disclosed report indicates a fair viewing process conducted by an objective detective who obtained a tentative identification which called for further efforts to determine if the victim could actually make an identification. Whereas, the suppressed report reflects the frustration of a detective who attempted and failed to get the victim to make an identification of a person he regarded as guilty and dangerous and indicates that those attitudes were conveyed to the victim.

Had the suppressed report been disclosed to the defense, pursuant to the orders of the court and the State's duty to

divulge exculpatory evidence, it would have been of great value to the defense in the cross-examination of Carol DaRonch and Jerry Thompson and in establishing the defense theory that Carol DaRonch was initially unable to identify the defendant but was induced to do so by police officers who, by repeatedly showing Appellant's photograph, taking her in attempts to view the defendant and his automobile, inducing her to positively identify his automobile, even though she testified that it "looked completely different" and identified it because "it was supposed to be the car," and generally convincing her that Appellant was the man who had kidnapped her and she was supposed to identify him.

The failure to disclose the suppressed report, the concealment of its existence by representations made to the court by the prosecutor, the delivery of the disclosed report and the testimony of Jerry Thompson that it accurately described the initial viewing, and the testimony of Jerry Thompson describing the initial viewing, all constituted a fraud upon the court and the defense and severely hampered the truth-finding process pertaining to the most critical issue at trial.

The foregoing described acts and omissions of the State effectively denied defendant his right to confront witnesses and his right to due process of law in violation of Sections 7 and 12 Article I of the Constitution of Utah and the 6th and 14th Amendments to the Constitution of the United States.

This Court in State v. Stewart, 544 P.2d 477 (Utah 1975), announced the rule governing nondisclosure of evidence favorable and material to criminal defendants:

"...(S)uppression or destruction of evidence by those charged with prosecution, including police officers, constitutes a denial of due process if the evidence is material to guilt or innocence of the defendant in a criminal case..."

Id., at 478.

The rule in Stewart is even broader in scope than that of the leading United States Supreme Court case in the field of suppression of evidence, Brady v. Maryland, 373 U.S. 83 (1963), in which the Court said:

"We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution."

Id., 373 U.S. at 87.

Stewart's extension of the duty to disclose to police officers has also been approved by the United States Supreme Court in its opinion in Giglio v. United States, 405 U.S. 150, (1972):

"Moreover, whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor. The prosecutor's office is an entity and as such it is the spokesman for the Government."

Id., 405 U.S. at 154. If the police were not burdened with a duty to disclose, the prosecutor could successfully claim that police

officers, who did the principle investigation of a case, had withheld exculpatory information from him, and, therefore, that he had no duty to disclose the material. This would leave the defendant with no assertable claim when his right to a fair trial had been clearly abridged. To impede due process disclosure in this fashion would effectively abrogate the fundamental fairness objectives sought by the many constitutional decisions requiring disclosure of favorable and material evidence to the defendant. For this reason,

"...The police are also part of the prosecution, and the taint on the trial is no less if they, rather than the State's Attorney, were guilty of nondisclosure.

* * * * *

"The duty to disclose is that of the state, which ordinarily acts through the prosecuting attorney; but if he too is the victim of police suppression of the material information, the state's failure is not on that account excused. We cannot condone an attempt to connect the defendant with the crime by questionable inferences which might be refuted by undisclosed and unproduced documents in the hands of the police."

Barbee v. Warden, 331 F.2d 842, 846 (4th Cir. 1964).

In the instant case, not only did the prosecutor and other agencies investigating the offense charged have a constitutional due process duty to divulge information favorable and material to the defense, but the trial judge had also imposed a strict order, directing that exculpatory material be disclosed to the

defense. On February 17, 1976, the Honorable Stewart M. Hanson, Jr., of the Third Judicial District Court, conducted a pretrial conference attended by David Yocom, Deputy Salt Lake County Attorney prosecuting the case, and John D. O'Connell and Bruce Lubeck, counsel for the defendant. A transcript of that proceeding shows that Judge Hanson issued the following oral discovery order:

"I think the discussion Friday ended on that note that I was convinced in my own mind that the law not only is that the Prosecutor has a duty to turn over any exculpatory materials to the Defense upon request, that extends not only to anything in his possession but anything in the possession of anyone else. And I think that is the law. And the gist of what I was saying Friday was that anything that relates to Miss DaRonch in any way from any agency should be turned over to Mr. Yocom so he can review it to make a determination whether there are in fact any exculpatory materials which he has a duty to give over to the Defense in this matter." (tr. at 5-6).

Due process imposes certain obligations on law enforcement and investigatory agencies to insure every criminal trial is a "search for the truth, not an adversary game." United States v. Perry, 471 F.2d 1057, 1063 (D.C. Cir. 1972). The principle behind establishing such a burden on the State "is not the punishment of society for the misdeeds of the prosecutor but avoidance of an unfair trial to the accused." Brady v. Maryland, supra., 373 U.S. at 87. In United States v. Agurs, 427 U.S. 97, (1976), the Supreme Court underscores this point by stating that

the constitutional obligation is measured not "by the moral culpability or the willfulness of the prosecutor" and that if constitutional error has occurred "it is because of the character of the evidence, not the character of the prosecutor." Id., 49 L.Ed.2d at 353. Therefore,

"...When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excused."

Id., 49 L.Ed.2d at 351.

In the present case, it is clear that the prosecutor and the investigating agencies had an unmistakable duty to disclose to Appellant exculpatory information, including the suppressed police report in question. The law, the trial court's order on discovery, and defense counsel's specific and repeated requests for such information all created that duty. Failure to release the suppressed report, which gives an exculpatory version of the victim's first viewing of defendant's picture, is totally inexcusable.

POINT II

THE SUPPRESSED POLICE REPORT IS FAVORABLE AND MATERIAL BECAUSE IT EFFECTIVELY DISCREDITS THE RELIABILITY OF THE STATE'S SOLE EYEWITNESS TO THE CRIME. THIS IS PARTICULARLY TRUE GIVEN THE OVERALL WEAKNESS OF THE STATE'S CASE.

In United States v. Agurs, supra., the Supreme Court noted that newly discovered evidence in the possession of the prosecutor places it in a "different category than if it had simply been

discovered from a neutral source after trial." Id., 49 L.Ed2d at 354. The defendant seeking a new trial because the State withheld evidence material and favorable to him "should not have to satisfy the severe burden of demonstrating that newly discovered evidence probably would have resulted in acquittal." Id., 49 L.Ed.2d at 354. This must be the rule because:

"...If the new standard applied to the usual motion for a new trial based on newly discovered evidence were the same when the evidence was in the State's possession as when it was found in a neutral source, there would be no special significance to the prosecutor's obligation to serve the cause of justice."

Id., 49 L.Ed.2d at 354.

There can be no question in the present case that the State suppressed evidence. It has also been shown that regardless of the motivation for failing to disclose the report, both the police and the prosecutor had a duty to disclose it. Now it is necessary to determine to what degree Appellant was prejudiced by the nondisclosure. Is the report in question material enough and exculpatory enough to warrant the finding of constitutional error? In Barbee v. Warden, supra., a formula for showing prejudice is outlined:

"How strong a showing is required in a given case will depend on the nature of the charge, the testimony of the state, and the role the undisclosed testimony would likely have played."

Id., at 847.

1. The Role the Undisclosed Testimony Would Likely Have Played. A substantial issue in any trial may be the credibility of prosecution witness because "(t)he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence..." Napue v. Illinois, 360 U.S. 264, 269, (1959). In Giglio v. United States, supra, the government's case depended almost entirely on a co-conspirator named Taliento. The government failed to reveal that Taliento had been promised immunity in return for his testimony. Commenting on how the importance of this witness influenced the trial, the Supreme Court said:

"Here the Government's case depended entirely on Taliento's testimony, without it there could have been no indictment and no evidence to carry the case to the jury. Taliento's credibility as a witness was therefore an important issue in the case, ...and the jury was entitled to know it."

Id., 405 U.S. at 154-155. In Giglio, the Court decided that "when the reliability of a given witness may well be determinative of guilt or innocence", then suppression of evidence of this kind warrants a new trial. Id., 405 U.S. at 154.

The issue of reliability takes on added significance in cases based on eyewitness identification. The suppressed report of Detective Thompson goes directly to the reliability of Carol DaRonch, the victim and sole eyewitness to the crime with which Appellant was charged. Without DaRonch's testimony, as without Taliento's, there could have been no charge filed against Appellant and no evidence sufficient to support a conviction.

According to the suppressed report, after she viewed Appellant's picture closely, "She said, 'That looked maybe something like him', she really just didn't know, she didn't think she could identify him (her abductor) if she saw him again or not." Nothing Ms. DaRonch could ever have said could have affected the reliability of her alleged identification of the defendant more profoundly. Suppression of this evidence requires the same result as found in Giglio: Reversal and a new trial.

Eyewitness identification cases are particularly affected by suppression of evidence because the suppression thwarts effective cross-examination which might reveal mis-identification. A case in point can be found in Norris v. Slayton, 450 F.2d 1241 (4th Cir. 1976). A rape victim was held by her assailant for forty-five minutes. About thirty minutes after the man left the victim's house, the defendant was apprehended by police in the area of the victim's home, taken back to her for identification, and identified by her attacker. The defendant was convicted of rape solely on the testimony of the victim.

The police officer, who apprehended the defendant and was present at the time the victim identified him, wrote a report which said:

"I took him to Mrs. McDaniel's house, who met us at the back porch screen door and the first thing she said was 'that is the man'. I said, 'Mrs. McDaniels are you sure?', and she hesitated and said, 'I know that is the man but cannot swear to it'."

Id., at 1244. The prosecutor was aware of this report but Norris' defense counsel were not furnished with a copy. Assessing the materiality of the new evidence in light of the importance of the witness' testimony, the Court in Norris said:

"...The primary issue before the jury was the identification of the petitioner... This evidence was of crucial value to the defense in cross-examining both Officer Leake and Mrs. McDaniels on her identification of Norris, especially in view of her equivocation at the preliminary hearing. It was evidence which had a direct bearing upon the critical issue in the case and might 'reasonably have weakened or overcome testimony adverse to the defendant.' Barbee, supra., at 847."

Id., at 1244.

The Norris court finally held that the recent decision of United States v. Agurs, supra., did not require a different result, since the suppressed report "was of such a nature to raise a substantial likelihood that it would have affected the result in Norris' trial." Id., at 1244.

Courts are particularly apt to set aside convictions based on the eyewitness identification testimony if only one person is involved and the State has suppressed evidence tending to reduce the reliability of that identification. In Austin v. Wyrick, 535 F.2d 443 (5th Cir. 1976), the petitioner was convicted solely on the eyewitness testimony of the victim who had given inconsistent and conflicting statements regarding the identity of his assailant. These statements were contained in police reports not disclosed to defense counsel. The Circuit Court said:

"We agree with the report of the magistrate wherein he states as follows:

'We cannot help but conclude that where the state's evidence is as thin as it is in the Austin case, which is supported only by a 'one-on-one' identification, that almost any admissible exculpatory evidence would be 'capable of clearing or tending to clear the accused of guilt'. We now have evidence before us, which neither the trial court nor the Missouri Supreme Court considered, which in our view justifies a remand and a new trial.'" (Emphasis added.)

Id., at 445.

In Norris, Austin, and the present case, the prosecutions relied heavily, if not exclusively, upon the victims' identification of the accused. Each case involved a single, eyewitness/victim of the incident. In all these cases, the State withheld a police report wherein the victim expressed doubt about her identification of the accused. In Norris, for example, the identification of the accused was far stronger than the one in the present case, but the court's concern about the impact of the suppressed evidence on the reliability of the identification caused it to reverse the case. Suppression of Detective Thompson's report, a report which casts much doubt on the ability of the witness to identify Appellant or her abductor, denied Appellant effective cross-examination of the witness on the critical issue of reliability, and violated his right to due process.

2. The Nature of the Charge. A second factor to be considered when assessing materiality of suppressed evidence, is the

nature of eyewitness testimony and the danger inherent therein. The present case involved the showing to the victim a picture of defendant on two occasions prior to her alleged identification of Appellant at the lineup. She testified at trial that she could have picked Appellant from the lineup based on having seen his pictures alone and that Appellant was the only one in the lineup who looked like his pictures. (R.446) She also testified that she identified Appellant automobile, even though it looked "completely different", because she had been led to believe that it was the same car she had seen in some pictures. (R.441) She testified that she associated the car she had "identified" with the pictures she had seen of Appellant. All this occurred prior to the lineup where she identified Appellant. The United States Supreme Court spoke of the dangers of this kind of situation when it wrote:

"It must be recognized that improper employment of photographs may sometimes cause witnesses to err in identifying criminals....This danger is increased if the police display to the witness...the pictures of several persons among which the photograph of a single such individual recurs or is in some way emphasized. The chance of misidentification is heightened if the police indicate they have other evidence that one of the persons pictured committed the crime. Regardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification."

* * * * *

"...The danger that use of the technique may result in convictions based on misidentification may be substantially lessened by a course of cross-examination at trial which exposes to the jury the method's potential for error."

Simmons v. United States, 390 U.S. 377, 383-384, 19 L.Ed. 2d 1247, 88 S.Ct. 967 (1968).

Cross-examination, then, is the means by which errors imbedded in critical identification testimony are exposed. In Norris v. Slayton, supra., Austin v. Wyrick, supra., and the present case, the suppression of the police reports regarding witness uncertainty and confusion in identifying the accused significantly decreased the defense's ability to explore, through cross-examination, the crucial issue: Reliability. The suppressed evidence in this case is material in part due to obvious potential for misidentification established by Ms. DaRonch's testimony. The Supreme Court in United States v. Wade, 388 U.S. 218, (1967), warned:

"...The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification...A major factor contributing to the high incidence of miscarriages of justice from mistaken identification has been from the degree of suggestion inherent in the manner in which the prosecution presents the suspect to the witnesses for pretrial identification."
Id., 388 U.S. at 228-229.

* * * * *

"Insofar as the accused conviction may rest on a courtroom identification in fact the fruit of a suspect pretrial identification

which the accused is helpless to subject to effective scrutiny at trial, the accused is deprived of that right of cross-examination which is an essential safeguard to confront witnesses against him."

Id., 388 U.S. at 235.

United States v. Wade stands for the extension of a defendant's right to counsel in a post-indictment lineup. It is not Appellant's contention that the suppression of evidence in this case is covered by Wade, since the notion that an attorney should represent a suspect at a pretrial photographic display has thus far been rejected as unworkable. The point to be illustrated, however, is that out-of-court photographic lineups nonetheless are subject to the same dangers as post-indictment, corporeal lineups, and that the goals of fairness and confrontation enunciated in Wade and Simmons should be considered when evaluating the materiality of evidence which relates to pretrial identification, and which has been suppressed by the State.

The conclusion based on this approach is that the suppression of the Thompson report of a photographic display shown to the sole eyewitness and victim, Carol DaRonch, thwarted Appellant's ability to fully and fairly expose through cross-examination the critical issue of reliability, and that his inability to do so may well have been dispositive of the guilty verdict against him.

3. The Testimony of the State. A third factor to be considered when assessing the materiality of the new evidence is

the overall weakness of the testimony adduced at trial which purported to inculcate the defendant. See Appellant's Brief, Point I. The lack of a strong case against the accused in Austin v. Wyrick, supra, was certainly a factor in reversing that case, since the court there noted the "thin" evidence in the Austin case. On reviewing the suppressed evidence here in the context of the entire record, "if the verdict is already of questional validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." United States v. Agurs, supra, 49 L.Ed.2d at 355. The weakness of the case against Appellant shall be briefly analyzed, as in Appellant's Brief, Point I, and the evidence shall be divided into two categories: Identification and circumstantial.

The identification testimony of Carol DaRonch grew out of her identification of Appellant in a lineup held eleven months after her abduction, during which she had been with her abductor from between ten and fifteen minutes. She identified Appellant at the lineup on the basis first of his walk (R. 412-413), although she had never told police officers there was anything distinctive about her abductor's walk. She also picked Appellant at the lineup because of his face (R.413), although she said there was nothing distinctive about his face in particular (R. 413), and her memory of her abductor's face was so vague that she first said he had a mustache, then decided a few days later that he did not, then finally felt that he did. (R. 427,

428, 489, 491). Appellant did not have a mustache at the lineup nor did he have one at the time of the kidnapping. The victim testified that she could have recognized Appellant from seeing his pictures alone, and that nobody else in the lineup looked like Appellant's picture. (R. 446) Nothing else about Appellant at the lineup reminded DaRonch of her abductor, although she did think Appellant looked different from her abductor because Appellant was shorter and more clean cut. (R. 412) She was positive of her identification of Appellant at the lineup and in court, but as the Supreme Court noted in United States v. Weis supra., "(i)t is a matter of common experience that once a witness has picked out the accused at the (pretrial confrontation), he is not likely to go back on his word later on." 388 U.S. at 229.

Da Ronch's alleged identification of Appellant's car is equally troublesome. She described her abductor's car on the night of her abduction as light blue or white, with lots of rust spots and dents and a rip on the top of the right side of the rear seat. (R. 471, 478) She did not change her description of that automobile until after seeing three pictures of Appellant's car shown her over nine months later. No pictures of other Volkswagen sedans were mixed in with pictures of Appellant's car. These poor quality Polaroid pictures depict a beige Volkswagen with a rip across the entire length of the back seat, and with no visible rust spots. At the time she saw these pictures, she

said that the car "resembled" the car she had ridden in when she was abducted, although the night of her abduction she told police that all Volkswagens looked alike to her. (Exhibit 6, page 6) Later she was taken to see Appellant's car while it was parked on the street. At trial she testified that the car she had been abducted in was beige, that she had never described it as light blue (R. 420, 421); and that the rip she had seen that night went all the way across the top of the back seat. (R. 406) Thus, her testimony had conformed to the appearance of Appellant's vehicle.

She said that she could identify Appellant's car from the pictures because it did not have a front license plate, and because of the damage depicted on the passenger door. (R. 407, 432, 433) However, none of the pictures shown to her reveal the front of the car, so one cannot determine if there is a license plate there or not, and none of the pictures shown to her show visible damage to the passenger door. (R. 433, 434; Exhibit 21) When asked if the car she had seen in person was the same car she had been abducted in, she noted that it was completely different, having a different color, no ripped back seat, and no rust spots. (R. 439) She might have identified it, however, because the police were not going to take her to see the wrong car, because she knew it had been changed, and because the police had told her that it was the car in the pictures. (R. 439) Such are the

dangers of one car or one man show-ups as mentioned in Simmons v. United States, supra., when the witness may "retain in his memory the image of the photograph rather than the person actually seen." Id., 390 U.S. at 383-384. "Subsequent identification of the accused then shows nothing except that the picture was a good likeness." Hammelman & Williams, Identification Parades 11 (1963) Crim. L. Rev., at 448. DaRonch's identification of Appellant's car is one influenced profoundly by suggestion.

The State's circumstantial case was at best remote in probative value. While Appellant's blood type "O" was the same type as a small quantity of blood found on DaRonch's coat three days after her abduction, officers, who closely examined her coat on the night of her abduction, could find no blood stains, and DaRonch could not remember scratching the man. Handcuffs owned by Appellant were not the same make or model as the ones which the victim escaped wearing on her arm. DaRonch never saw the metal instrument held by her abductor, nor did she ever testify that the crowbar belonging to Appellant resembled the metal object she felt that night. Appellant's ownership of patent leather shoes was conflicting. In any event no such shoes were introduced. That was the entirety of the circumstantial case against Appellant. There was no physical evidence presented and no other eyewitness testimony to corroborate the Da Ronch identification. The evidence against Appellant was thin.

Finally, when considering the amount and character of the evidence, ~~on each thereof~~, against Appellant, it should be

noted that this was a bench trial. Judge Hanson spent three days deliberating the evidence. He characterized his decision as extremely difficult. It is apparent that to this judge the case was closely balanced, and the misconduct which forestalled effective cross-examination and impeachment of the key prosecution witness may have tipped the balance beyond a reasonable doubt.

4. Summary.

(a) Suppression of evidence affecting credibility of key prosecution witnesses violates due process, Giglio v. United States, supra., Napue v. Illinois, supra.

(b) Carol DaRonch was the sole eyewitness and victim to her abduction. Without her testimony, Appellant would not have been charged or convicted. A report stating that after she first saw Appellant's picture, she said she could not identify her abductor, was suppressed.

(c) Materiality of suppressed evidence is enhanced by a verdict of questionable validity. United States v. Agurs, supra., Austin v. Wyrick, supra.

(d) DaRonch's identification testimony is very inconsistent and indicative of susceptibility to suggestion, and the circumstantial evidence introduced is of little value.

(e) The nature of eyewitness identification testimony makes effective cross-examination essential. Norris v. Slayton, supra., Simmons v. United States, supra., United State v. Wade, supra.

(f) Suppression of Thompson's police report denied Appellant crucial material to cross-examine Ms. DaRonch and Thompson on her ability to identify Appellant.

(g) Appellant need not show that the new evidence would probably result in acquittal, United States v. Agurs, supra., or that it would have proved innocence. Barbee v. Warden, supra.

(h) Rather, if it might reasonably have overcome or weakened testimony adverse to Appellant and cause a reasonable likelihood it could have affected the result, then there has been a constitutional error. Norris v. Slayton, supra.

The new evidence in this case satisfies the standard of materiality giving rise to the prosecutorial duty to disclose it. Hence, Appellant's right to due process has been violated. The conviction must be set aside since:

"...The report might not have been proof of the defendant's innocence, but if its contents had been known, it might well have nurtured, even generated, a reasonable doubt as to guilt. One cannot possibly say with any confidence that such a defect in the trial was harmless. A procedure so burdened with the tendency to harm accords a defendant less than due process."

Barbee v. Warden, supra., at 847.

POINT III

THE COURT BELOW APPLIED AN ERRONEOUS
STANDARD IN DETERMINING THE EFFECT OF
THE NEW EVIDENCE

The court below found there was no "willful" withholding of information by either police or prosecution. The court ruled

it did not believe the inconsistencies between the two reports would have made any difference in the conduct of the trial.

(R. 1238) The court ruled that because the new evidence would not make any difference to the outcome of the trial, the Petition and Motion of Appellant must be denied. (R. 1234-1238)

Appellant contends that such a ruling was based upon a completely erroneous standard of "making any difference" in the trial outcome. It does not matter if the new evidence "would have made a difference" or "affected the outcome" or any such similar standard.

One of the cases cited by the State in its memorandum in Support of Motion to Dismiss (R. 1005) is most helpful to Appellant on this issue. That case is United States v. Agurs, 427 U.S. 97 (1976). In Agurs the defendant was convicted of second degree murder for the stabbing of a man in a motel room. Her defense was self-defense. After trial, her attorney discovered the victim had past convictions for carrying a concealed weapon. On a motion for a new trial she claimed the evidence, had it been shown at trial, would have been favorable to her claim of self defense. Before trial she made no request for such information. The Court, in passing upon the claim, noted three distinct types of cases where evidence was known to the prosecution but not the defense. The first is where the prosecution's case includes perjured testimony and the prosecution knew, or should

have known of the perjury. In such a case if the evidence would "in any reasonable likelihood" affect the verdict, the judgment must be set aside. The second type of case was the Brady, supra, situation, where there is a pretrial request for specific information. In that case, the court said in Agurs, 427 U.S. at 104, if the suppressed evidence "might have affected the outcome of the trial" relief is to be granted. Agurs is often cited for a "higher" standard of proof for the defense because it involved the third type of case and a higher standard must be met by the defense in that type of case. That is, where there is no request by defense for any specific type of material, the judgment will not be set aside unless the defense can show that the omitted evidence resulted in a denial of a fair trial. 427 U.S. at 108. Thus, where there is a specific request the defendant does not have to meet the severe burden of "demonstrating that the newly discovered evidence probably would have resulted in acquittal." 427 U.S. at 111.

Appellant also contends that implicit in Agurs is the notion that the defense "burden" to show the result of the newly uncovered evidence is less where the prosecution has "hidden" the evidence than where the evidence has been discovered from a neutral source. Thus, if a piece of physical evidence or a witness is found after trial by the defense, and the prosecution had no knowledge of it, it may be reasonable to expect the defense

to show more fully the result that the new evidence may have had on the verdict. But, where the prosecution had that evidence, to require the defense to bear that same burden destroys any incentive that the prosecutor might have for turning over the evidence to the defense. If the defense is going to have to "prove" the effect of the new evidence on the verdict, why give it to him - he will have a difficult time and the prosecution is not "motivated" to turn the material over to the defense. This is the identical rationale behind the exclusionary rule.

This "Standard of Proof" the defense must bear is clearly very crucial in "new evidence" cases. For the court below to apply an erroneous standard, as it did, is to miss the entire thrust of Appellant's motion. Appellant submits that to require him to show that the newly discovered evidence would "have made a different" in the trial outcome is to require something that the law does not require and that would be virtually impossible to prove. If Appellant shows, and he submits he has, that the evidence "might have" affected the trial then he has met the requirements of the law. Because the court below applied an erroneous standard, Appellant submits this court should reverse the judgment of the court below and grant Appellant a new trial.

POINT IV

DISCLOSURE PRIOR TO TRIAL OF DETECTIVE THOMPSON'S FALSE AND MISLEADING REPORT REPRESENTS GOVERNMENTAL MISCONDUCT, CORRUPTS THE TRUTH-SEEKING FUNCTION OF A FAIR TRIAL, AND VIOLATES DUE PROCESS.

It has long been recognized that when the State includes in its case evidence or testimony which it knows or should know is false, then a violation of due process of law has occurred. Mooney v. Holohan, 294 U.S. 103, 79 L.Ed. 791, 44 S.Ct. 340 (1935); Pyle v. Kansas, 317 U.S. 213, 87 L.Ed. 214, 63 S. Ct. 177 (1946). The United States Supreme Court has found error even when the State's complicity was passive, since "(t)he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected." Giglio v. United States, *supra*, 405 U.S. at 153. As reflected in Napue v. Illinois, *supra*, the falsehood need not be limited to matters going only to the actual guilt or innocence of the accused:

"The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any ordered concept of liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness."

Id., 360 U.S. at 269.

The purpose of the discussion which follows is to draw an analogy between the use of false testimony cited above, and, as in the present case, the State's delivery to the defense of

a false and misleading police report concerning a critical pre-trial identification session involving the State's sole eyewitness.

The released report gave a somewhat favorable and positive account of the showing by Detective Thompson of Appellant's picture to Carol DaRonch. Unfortunately, this witness was unable to recall during her testimony at the trial just what had transpired during the photographic display in question, what she said at that time, or even if she had picked anyone. (R. 408-411) However, she did testify to the effect that she saw Appellant's picture on that occasion. (R. 408) During the preliminary hearing she said that upon seeing Appellant's picture her response was: "These look a lot like him, but I'm not sure." (P.H. tr 69) The impression that she identified Appellant's picture is subsequently supported by the testimony of the officer who authored the falsified report, and showed DaRonch the first photo display containing Appellant's picture, Detective Thompson. He testified that she pulled Appellant's picture from a stack and stated, "Yes, I believe that looks a lot like the individual." (R. 497) This account is contradicted by, or at least significantly modified by Thompson's report suppressed by the State, but the defense was powerless to effectively impeach Thompson, or for that matter, DaRonch, without knowledge of evidence of the prior inconsistent statements contained in the suppressed version.

Appellant's position is that Thompson's testimony amounts to perjury, or a strong inference thereof. Most blatantly false is his testimony that, after what he refers to as a tentative identification by the eyewitness, DaRonch, he thought he was "close". (R. 504) Because of this he maintained that he was justified in showing DaRonch a second photograph of Appellant a few days later. (R. 504) The clear inference he makes here is that DaRonch was a reliable enough witness that she was either "close" to a positive identification or that he was "close" to an arrest in the case. No matter what rationale he uses in an attempt to legitimize the second display, the suppressed version of this incident indicates that DaRonch may not have even tentatively identified Appellant's photo, that Thompson thought her to be a "very poor witness", that he was looking for witnesses other than DaRonch to view Appellant in a lineup, and that she did not think she could identify her abductor if she saw him. These are not the kinds of facts and observations which would make a man feel "close" to anything. Thompson's credibility and DaRonch's reliability as an eyewitness are brought clearly into question by the suppressed report.

According to United States v. Agurs, supra, if the undisclosed evidence shows that "the prosecution knew or should have known of the perjury", then the conviction:

"...must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury... (T)he court has applied a strict standard of materiality, not just because they (the false evidence cases) involve prosecutorial misconduct, but more importantly they involve a corruption of the truth-seeking function of the fair trial process."

Id., 49 L.Ed. 2d at 349-350.

The Agurs "reasonable likelihood" test was based on similar tests used in Giglio, supra, and Napue, supra. It is applicable to this case because (1) the undisclosed evidence shows Thompson's and DaRonch's testimony to be false or misleading, and (2) the delivery of the false report to the defense prior to trial amounts to the use of false evidence and is a corruption of the truth-seeking process.

Perhaps the most insidious effect of this kind of false evidence shows itself not on the stand directly, but in the manner in which it blunts and misleads the pretrial preparation of the defense. The defense received, prior to trial, a report which falsely portrays the State's principle witness as having made an identification of the accused through photographs and that this same witness was ready, willing and able to identify her abductor in a lineup. This witness would not talk to defense attorneys prior to trial (P.H. tr. 75, 120), which left only Thompson, the author of both the falsified report and the suppressed report, to verify the accuracy of the falsified report. This he

did do on numerous occasions in the courtroom when using the falsified report to "refresh" his memory on the witness stand. Misled into believing the report, even defense attorneys began to mouth the words and phrases of falsified statements attributed to Ms. DaRonch. Such a deception is as serious a violation of the truthseeking function of the fair trial process as overt perjury.

In Napue v. Illinois, supra., the Supreme Court makes reference to a portion of an opinion in People v. Savvides, 136 N.E.2d 853, 854, 855 (1956):

"It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon the defendant's guilt. A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knew to be false and elicit the truth...That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing as it did, a trial that could in any real sense be termed fair."

Napue v. Illinois, supra., 360 U.S. at 369-370.

The information suppressed by the State is directly relevant to this case and the credibility of its key witnesses. There is a reasonable likelihood that the false and misleading report and testimony based on that report could have influenced the trier of fact.

This Court cannot allow to go uncorrected instances where false and misleading testimony played a key role in the trial.

The conviction must be set aside and a new trial granted.

POINT V

THE IDENTIFICATION OF APPELLANT WAS THE
RESULT OF UNNECESSARILY SUGGESTIVE PROCEDURES
IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE
FOURTEENTH AMENDMENT.

In Point I of Appellant's original brief and reply brief he argued that the eyewitness identification procedures were improper. (Appellant's Brief 12-20) Obviously the additional fact brought out in Appellant's Motion for a New Trial affect the argument presented there. Appellant contends that his position is strengthened on this issue. The State in its' brief argued that Appellant was merely setting forth theories and was making bald accusations. Appellant will not here reargue the point made clear in Point I of the original brief and in this brief that the witness Carol DaRonch was at first a very unsure witness who later made a "positive identification" because of the conduct of law enforcement personnel set forth in this brief.

CONCLUSION

For the reasons above stated, that the court below erred in denying Appellant's Motion for a New Trial or Petition for Extraordinary Relief, Appellant respectfully submits that the

order of the Court below should be reversed and the matter remanded for a new trial.

Respectfully Submitted,

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